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No. 88-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WALTER M. KETCHUM,

Petitioner,

vs.

ADMINISTRATOR, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISIONS INVOLVED

The ex post facto clause of the United States Constitution provides, "No State shall . . . pass any . . . ex post facto law." U.S. CONST. Art. I, §10.

The due process clause of the United States Constitution provides, "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

Supreme Court Rule 7-110. Relationship with Officials. (1980)

(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Supreme Court Rule 7-110(a). Relationship (Amended 1988)

"(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal <u>except those gifts or loan which a judge or a member of his family may receive under Rule 65(c)(4) of the Code of Judicial Conduct</u>, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

Supreme Court Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related law, the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

Supreme Court Rule 771. Types Of Discipline

(a) disbarment;
(b) disbarment on consent;
(c) suspension for a specified

period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of the court with probation; or
(g) censure.

INTRODUCTION

For the sake of brevity, Respondent will not provide sections in its brief for opinion below, jurisdiction, and statement of the case. Respondent will address in its argument those portions of those sections of Petitioner's brief which Respondent considers inaccurate or inadequate.

QUESTION PRESENTED

Whether the procedure employed by the Supreme Court of Illinois imposing discipline on Petitioner for his violation of long-established ethical principles violated the due process requirement or ex post facto clause of the United States Constitution.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner was not denied due process of law during the course of the

disciplinary proceedings against him. Petitioner received notice of the charge and an opportunity to defend, in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

Second, in disciplining Petitioner, the Supreme Court of Illinois did not retroactively apply a new standard to Petitioner's acts of misconduct in violation of the ex post facto clause. Petitioner's conduct was violative of the former construction of Rule 7-110(a) as well as the new construction.

Third, the amount of discipline imposed is within the discretion of the Supreme Court of Illinois. Such flexibility is crucial to achieve the ultimate goals of the disciplinary system. The only issue in fact raised by this petition is an issue of state law, which the Illinois Supreme Court has already decided.

ARGUMENT

Lawyer discipline is within the inherent authority of the state courts. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of

Illinois. See In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282, 1284 (1980).

Petitioner was suspended from the practice of law for two years by the Supreme Court of Illinois for making numerous and substantial interest free unsecured loans to the presiding judge of a division in which he regularly practiced. Further, Respondent was disciplined for soliciting loans from other lawyers to the judge despite knowing the judge's propensity for failing to pay obligations.

Respondent was suspended for violating Rule 7-110(a) of the Illinois Code of Professional Responsibility as amended in a companion attorney disciplinary case, In re Corboy, et al., 124 Ill.2d 29, 528 N.E.2d 694 (1988). Prior to the rule's amendment, Illinois strictly prohibited all loans or gifts from lawyers to judges except for

campaign contributions to designated judicial campaign committees. Id. at 699. In Corboy, Rule 7-110(a) was amended to permit lawyer gifts and loans to judges if judges could accept the items pursuant to state judicial ethics guidelines. Id. As a result of the amendment, lawyers are, among other things, explicitly permitted to make gifts and loans to judges if they constitute common social courtesies or if the gifts are between members of a family. Id. at 701.

In selecting the amount of attorney discipline to be imposed, the Illinois Supreme Court balances the need to be consistent with a consideration of the unique facts of the particular case. See In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978). Based on the unique facts of this case, including the repeated nature of the disciplinary violations and

Respondent's contemporaneous knowledge that lawyers were forbidden by rule to make loans to judges, the Court suspended Petitioner. In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988).

Petitioner argues that he was denied due process when the Illinois Court sua sponte amended Rule 7-110(a) in the Corboy case. His argument is meritless. In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both requirements have been met. Respondent had notice that he was charged with making and soliciting proscribed loans to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner.

In support of his due process argument, Petitioner relies on this Court's holding in Bouie v. Columbia, 378 U.S. 347 (1964). Bouie, however, is easily distinguishable. In Bouie, it was found that due process was violated because a state's interpretation of a criminal statute punished conduct which was not criminal at the time the act was committed. Therefore, the defendants lacked fair warning that their conduct was prohibited. In this case, Respondent's actions were wrong under the prior disciplinary rule and wrong under the rule as amended. In that Respondent knew that loans to judges were prohibited, he had more than fair warning that he could not engage in such activity.

Petitioner cites several cases which stand for the proposition that the ex post facto clause prohibits application of a new law or standard to prior acts or conduct.[1]

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1. Bouie v. Columbia, 378 U.S. 347 (1964);
Marks v. United States, 430 U.S. 188 (1977);
Pierce v. United States, 314 U.S. 306 (1941);
Calder v. Bull, 3 Dall. 386 (1798);
Miller v. Florida, 107 S.Ct. 2446 (1987);
Weaver v. Graham, 450 U.S. 24 (1981);
Dobbert v. Florida, 432 U.S. 282 (1977);
Cummings v. Missouri, 4 Wall. 277 (1867).

Petitioner's ex post facto concerns are, however, misplaced based upon a review of the case law.[2]

Petitioner fails to understand that the Illinois Supreme Court did not retroativeley apply a new standard to his conduct. The Court held Petitioner's acts violated the former construction of Rule 7-110(a) as well as the new construction. 528 N.E.2d at 693. "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Dobbert, supra, at 294.

2. In Bouie, Marks, Cummings, and Pierce, the manner in which the statute or law was applied transformed innocent conduct into criminal activity. In Miller, revised sentencing guidelines in effect at the time of sentencing were applied instead of the guidelines that were in effect when the defendant committed the crime. In Weaver, a new statute resulted in the reduction of a prisoner's credit time for good behavior that had been available under the repealed statute. In Calder, after plaintiff was awarded certain property, a subsequent law was passed which, in effect, divested the property. In Dobbert, a defendant's argument of ex post facto violation in regard to change in state death-sentencing procedure was rejected.

Petitioner fails to understand that the Illinois Supreme Court did not retroactively apply a new standard to his conduct. The Court held Petitioner's acts violated the former construction of Rule 7-110(a) as well as the new construction. 528 N.E.2d at 693. "It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Dobbert, supra, at 294.

Petitioner's basic underlying grievance is that he did not receive the same disciplinary sanction as certain attorneys in the Corboy case. In Corboy, six lawyers were found to have violated amended Rule 7-110(a). The Court declined, however, to impose sanctions upon them due to the unique facts surrounding their financial transactions.

The Court was not required to make Petitioner's sanction consistent with others who were found to violate the same

disciplinary rule. Final responsibility for determining discipline to be imposed on attorneys rests in the Supreme Court of Illinois. In determining the appropriate penalty, the Court may properly consider all facts and circumstances in aggravation and mitigation, including the attorney's actual conduct. See In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980). Furthermore, this Court has rejected the notion that there is a constitutional right of proportionality of sanctions, even in criminal proceedings. See e.g., Pulley v. Harris, 465 U.S. 37 (1984). Even if it could be argued that a criminal defendant were entitled to this type of proportionality, the concept should not apply to an attorney disciplinary proceeding. A disciplinary proceeding is simply not criminal in nature. In re Daley, 549 F.2d 469 (7th

Cir. 1977) cert. denied 434 U.S. 829 (1977). C.f., In re Ruffalo, 390 U.S. 544 (1968). (Disciplinary proceedings, although sui generis, described as quasi-criminal).

Flexibility in imposing sanctions is neither arbitrary nor unconstitutional, but necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice. See Middlesex County Ethics Committee, etc. v. Garden State Bar Association, et. al. 457 U.S. 423, 434-35 (1982). To achieve fair results, the disciplinary systems must be neither rigid nor mechanistic, but flexible enough to allow for the uniqueness of each case. See In re Leonard, 64 Ill.2d 398, 356 N.E.2d 62, 66 (1976). The Court must evaluate each situation independently because the circumstances

of each case vary substantially and sanctions which are appropriate in one situation may be inappropriate in another even though the underlying offense is similar or even the same. See In re O'Hallaren, 64 Ill.2d 426, 356 N.E.2d 520, 523 (1976). The Illinois Court correctly applied these principles in deciding the proper sanction for Petitioner.

In addition, Supreme Court Rule 771 provided Petitioner with sufficient notice that the state court had the authority to impose discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. Thus the issue of appropriate sanction as raised by Petitioner is a matter of state law. No substantial federal questions exist.

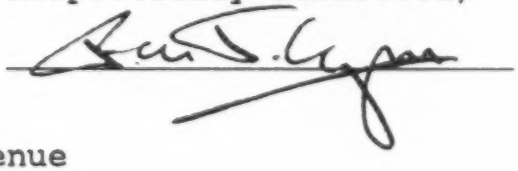
In summary, the due process provision of the United States

Constitution does not require a more exacting standard than that employed by the Supreme Court of Illinois. A clarification of a state ethics rule did not violate any ex post facto or due process principles. Further, disparate sentencing is not a proper basis for certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, Respondents respectfully submit the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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